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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS E. HORNISH AND SUZANNE
J. HORNISH JOINT LIVING TRUST,
TRACY AND BARBARA NEIGHBORS,
ARUL MENEZES AND LUCRETIA
VANDERWENDE, LAKE SAMMAMISH
4257 LLC, HERBERT MOORE AND
ELYNNE MOORE, AND EUGENE
MOREL AND ELIZABETH MOREL,

Plaintiffs,

vs.

KING COUNTY, a home rule charter county,

Defendants.

Case No.: 2:15-cv-00284-MJP

**PLAINTIFFS' REPLY TO
DEFENDANT'S OPPOSITION TO
PLAINTIFFS' CROSS-MOTION FOR
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:
March 11, 2016

**PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION
TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY
JUDGMENT**

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1 **I. INTRODUCTION**

2 King County is intent on ignoring both the purpose and the plain language of the Trails
3 Act. Although King County acknowledges that the purpose of the Trails Act “is to preserve
4 established rights-of-way,” King County wants to ignore the precise language of the Trails
5 Act that preserves rights-of-way for future reactivation of rail service only.

6 King County miraculously argues that Plaintiffs’ interpretation of the Trails Act would
7 have “the opposite effect of eliminating any existing railroad easements in the corridor and
8 replacing them with an undefined, uncertain, and inchoate federal easement.”¹ King County’s
9 argument is not only contrary to the specific language of the Trails Act, but it is also directly
10 contrary to an avalanche of federal jurisprudence, and authority from the Supreme Court of
11 Washington, that the railroad purposes easement is extinguished due to the change in use but
12 for the Trails Act and, under the Trails Act, the railroad purposes easement is replaced on an
13 interim basis so that the right-of-way can be used as a hiking and biking trail only. The
14 resulting easement under the Trails Act is not “an undefined, uncertain, and inchoate federal
15 easement” at all but is, instead, a well-defined and well-settled easement for a hiking and
16 biking trail.
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19 King County’s only real argument is that Judge Coughenour “properly rejected” these
20 same arguments in *Kaseburg v. Port of Seattle*, No C14-0784-JCC (W.D. Wash.). Although
21 Plaintiffs acknowledge that Judge Coughenour reached a different conclusion in *Kaseburg*,
22 the fact is that Judge Coughenour’s rulings are contrary to every decision rendered by every
23
24
25

¹ See Def.’s Br., Doc. 61, at p.1.

1 judge confronted with the issue in the Court of Federal Claims and the Federal Circuit on
2 numerous occasions.²

3 **II. CONTRARY TO KING COUNTY’S ASSERTION THAT RAILBANKING**
4 **PRESERVES THE RAILROAD’S EASEMENT FOR CURRENT USES, THE**
5 **TRAILS ACT CONVERTS RAILROAD PURPOSES EASEMENTS TO**
6 **TRAIL/RAILBANKED EASEMENTS**

7 **A. The Trails Act Authorizes Recreational Trails and Railbanks the Former**
8 **Railroad Corridor**

9 What is the Trails Act and what was its purpose? The purpose of the Trails Act was to
10 first and foremost encourage and promote recreational trails by allowing the preservation of
11 railroad rights-of-ways for future use and allow federal jurisdiction to remain over those former
12 rights-of way by preventing the land from reverting to the adjacent landowners. The entire
13 purpose of the Act was to encourage and establish hiking and biking trails by utilizing would-
14 be abandoned rights-of-way, that were actually abandoned by the railroad under the Trails Act,
15 and then had abandonment blocked by the Trails Act in order to utilize the right-of-way for
16 hiking and biking trails.

17 Specifically, the Act authorized three types of trails: the National Scenic Trails,
18 National Recreation Trails, and connecting-and-side trails. *Id.* The Act is quite comprehensive
19 and a complete reading of the Act provides the evidence that the Act and its sole purpose was
20 to narrowly authorize and promote recreational trails. The Act is specific and provides for
21 trails and nothing more. This was the sole purpose of Congress—to prevent the loss of this
22

23
24
25 ² The Court of Federal Claims (“CFC”) hears Trails Act takings cases because of the Tucker Act and the Federal
Circuit hears appeals from the CFC pertaining to the Trails Act.

1 national treasure by preserving rights-of-way for potential future use and promoting trails—
2 period.

3 However, because issues existed relating to the reversion of rights-of-way to the
4 adjoining landowners prior to consummating the establishment of trails, and in order to prevent
5 reversion and allow trail users time to negotiate with railroads, Congress enacted section
6 1247(d). 16 U.S.C. 1247(d). In 1983, concerned by the rapid contraction of America's rail
7 network, Congress amended the National Trails System Act to create the railbanking program.
8 Railbanking is a method by which lines proposed for abandonment can be preserved through
9 interim conversion to trail use:
10

11 The Secretary of Transportation, the Chairman of the Interstate Commerce
12 Commission, and the Secretary of the Interior, in administering the Railroad
13 Revitalization and Regulatory Reform Act of 1976, shall encourage State and
14 local agencies and private interests to establish appropriate trails using the
15 provisions of such programs. Consistent with the purposes of that Act, and in
16 furtherance of the national policy to preserve established railroad rights-of-way
17 for future reactivation of rail service, to protect rail transportation corridors, and
18 to encourage energy efficient transportation use, in the case of interim use of
19 any established railroad rights-of-way pursuant to donation, transfer, lease, sale,
20 or otherwise **in a manner consistent with the National Trails System Act**, if
21 such interim use is subject to restoration or reconstruction for railroad purposes,
22 such interim use shall not be treated, for purposes of any law or rule of law, as
23 an abandonment of the use of such rights-of-way for railroad purposes. If a
24 State, political subdivision, or qualified private organization is prepared to
25 assume full responsibility for management of such rights-of-way and for any
legal liability arising out of such transfer or use, and for the payment of any and
all taxes that may be levied or assessed against such rights-of-way, then the
Commission shall impose such terms and conditions as a requirement of any
transfer or conveyance **for interim use in a manner consistent with this Act**,
and shall not permit abandonment or discontinuance inconsistent or disruptive
of such use.

Id.

1 Even though the Act only specifies recreational trails, the Defendants attempt to
2 interject other uses for railbanked rights-of-way which violate all rules of statutory
3 construction. As provided by the Rehnquist Court's Canons of Statutory Construction, the
4 plain meaning of the ordinary statutory text should be followed—here, allowing would-be
5 abandoned railroad rights-of-way to be used as recreational trails while railbanking the
6 corridor. Moreover, the canon of *Expressio unius* provides that the expression of one thing
7 suggests the exclusion of others—here, use as a recreational trail excludes uses other than trail
8 use. See http://www.ncsl.org/documents/lss/2013PDS/Rehnquist_Court_Canons_citations.pdf (last
9 visited 9/29/2015).

11 Congress did not intend to allow third parties or governmental entities to abuse the
12 Trails Act in order to utilize the rights-of-way for other purposes other than reactivation or trail
13 use. If Congress intended any other type of use, it would have expressly stated so. It did not.
14 Congress was very specific in the language of the Trails Act and authorized trails upon would-
15 be abandoned railroad rights-of-ways and nothing more.

17 A railbanked easement, as a matter of law, is a preservation of the railroad purposes
18 easement for potential future reactivation, not the current right to use a railroad purposes
19 easement. In fact, in order for any entity, Defendant or not, to invoke the use of the railbanked
20 corridor, it must comply with the reactivation requirements of the STB. As stated by the STB,
21 whoever holds the reactivation rights could request that the NITUs be vacated to permit
22 reactivation for continued rail service in the future. It is clear under the Trails Act, as well as
23 the STB's own decisions, that the corridor is either a railroad running trains or a recreational
24 trail—one or the other—period.
25

1 **B. Railbanking Does Not Preserve the Railroad Purposes Easement Under**
2 **the Trails Act for Current Railroad Purposes Because Railbanking is Not**
3 **a Railroad Purpose**

4 King County argues that the Trails Act preserves the railroad easement and merely adds
5 the recreational trail to it. That is legally incorrect. Railbanking maintains federal jurisdiction
6 over the line and preserves a potential future railroad purposes easement upon reactivation.
7 King County argues that because BNSF previously held a railroad purposes easement, and
8 because the right-of-way is now railbanked, they can use the right-of-way in any manner that
9 is incidental to railroad activities. King County cannot, however, because railbanking
10 preserves the right-of-way for possible reactivation in the future and railbanking is not a current
11 railroad purpose. In the railbanking process, the federal government maintains jurisdiction
12 over the right-of-way and a railroad must petition the STB for reactivation of the railroad.
13 Under the Trails Act, the trail user cannot use the recreational trail easement for railroad
14 purposes or any other purposes other than as a recreational hiking and biking trail.³

15 Courts have always declined to find that railbanking is a current railroad purpose. *See,*
16 *e.g., Preseault II*, 100 F.3d at 1554 (Rader, J., concurring) (rejecting the railbanking argument
17 as a “vague notion,” incapable of overriding the present use of the property as a recreational
18 trail); *Longnecker v. United States*, 105 Fed.Cl. 393 (Fed. Cl. 2012) (involving Washington
19 state property laws); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 146 (Fed. Cl. 2011)

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22
23 ³ Although King County holds the “residual common carrier rights and obligations,” King County cannot
24 reactivate rail service alone because King County is not a “railroad” or “rail carrier” and does not comply with
25 the requirements of a railroad subject to the jurisdiction of the STB—and the STB has jurisdiction over any
 reactivation of the railbanked corridor. *See* 49 U.S.C. § 10102 (defining “rail carrier” as “a person providing
 common carrier railroad transportation for compensation, but does not include street, suburban, or interurban
 electric railways not operated as part of the general system of rail transportation.”); *see also*, 45 U.S.C. § 151
 (defining rail carrier).

1 (interpreting Massachusetts law in which the court stated, “that railbanking is too hypothetical
2 and unlikely to serve as a railroad purpose”); *Nordhus Family Trust v. United States*, 98 Fed.
3 Cl. 331, 339 (Fed. Cl. 2011) (interpreting Kansas law, the court stated, “[i]n the present case,
4 there is no evidence of any plan to reactivate rail service and railbanking is simply a speculative
5 assertion by Defendant that some resumed rail service could occur in the future. The transfer
6 of the easement to entities completely unconnected with rail service, and the removal of all rail
7 tracks on the corridor, lead the Court to conclude that any future rail use simply is unrealistic”);
8 *Rogers v. United States*, 90 Fed. Cl. 418, 432 (Fed. Cl. 2009) (interpreting Florida law and
9 indicating, “[h]ere, as in *Preseault II*, the use of the right-of-way as a public trail while
10 preserving the right-of-way for future railroad activity was not something contemplated by the
11 original parties to the Honore conveyance back in 1910”). As a result of overwhelming
12 authority from numerous judges and Courts who have interpreted the Trails Act, the potential
13 future reactivation of the railroad under the railbanking provision of the Trails Act is not a
14 current railroad purpose.
15

16
17 As a threshold matter, it is imperative to note that if railbanking under the Trails Act
18 was a current railroad purpose that allowed current incidental uses there would not be any
19 Trails Act takings cases because the reversionary interest, which is the right to have land back
20 unencumbered by a railroad purposes easement, would **never vest** because the railroad
21 purposes easement did not extinguish or expire upon issuance of a NITU under the Trails Act.
22 The railroad purposes easement is instead converted to a new “railbanked” easement/trail
23 easement that replaces the former railroad purposes easement. That result is required because
24 railbanking is not a railroad purpose.
25

1 King County simply does not have any current rights in a railroad purposes easement
2 under the Trails Act, but rather, the right for a recreational trail period. Rather, King County
3 acquired a recreational trail/railbanked easement pursuant to their acquisition of the right-of-
4 way under the Trails Act. The Washington Supreme Court decision in *Lawson v. State of*
5 *Washington*, 730 P.2d 1308 (Wash. 1986), which was completely analyzed and basically
6 adopted by the Federal Circuit in *Preseault v. United States*, 100 F.3d 1525, 1543, 1550 (Fed.
7 Cir. 1996), totally eviscerates King County's argument that they are entitled to use the right-
8 of-way for their incidental purposes. In *Lawson*, the Court held that:
9

10 Plaintiffs have alleged that the grantors conveyed easements for railroad
11 purposes only... Although specifically interpreting the deed involved in that
12 case, our decision in *Zobrist* provides guidance here; clearly, a hiking and
13 biking trail is not encompassed within a grant of an easement for railroad
14 purposes only. In the words of the Wisconsin State Supreme Court, '[t]o hold
15 that the conversion from a public transportation system to a recreational system
16 still reflected the purpose of the original easement would, in our view, stretch
17 the principle of *Faus* beyond reasonable limits.' *Pollnow v. Department of*
Natural Resources, 88 Wis. 2d 350, 366-67, 276 N.W.2d 738 (1979)
(construing common law). Pollnow and other decisions from other jurisdictions
support our conclusion that a change in use of a railroad right of way to a
recreation trail or nature trail is a change of use evidencing abandonment of the
right of way.

18 *Lawson*, 730 P.2d at 1312-13 (emphasis added).

19 First, King County, as the "trail user" under the Trails Act (the manner they acquired
20 their interest formerly held by BNSF), is authorized to use the land as a trail and trail use is a
21 change in use under *Lawson*. Second, because trail use causes termination of a railroad
22 purposes easement under state law pursuant to *Lawson*,⁴ then the **only way** the railroad
23

24 _____
25 ⁴ It is Plaintiffs' position that change to a trail use also causes termination of the current railroad purposes
easement under federal law and that railbanking is a new easement for the preservation of the potential and
future reactivation of a railroad.

1 purposes easement currently exists is **if railbanking is a railroad purpose**. The United States
2 Supreme Court and every other court to examine the issue has rejected that argument. The
3 easement that exists under the Trails Act is NOT a current railroad purposes easement currently
4 available or used for railroad purposes, but rather has been preserved for future *potential* use.
5 Every court addressing the issue has ruled that railbanking is NOT a railroad purpose. A
6 current active railroad purposes easement must currently be used (by a railroad) in order to
7 allow uses that are incidental, which actually means uses that benefit and serve the railroad.
8

9 **III. EVEN IF A RAILROAD PURPOSES EASEMENT CURRENTLY EXISTS,**
10 **WHICH IT DOES NOT, KING COUNTY CANNOT USE THE CORRIDOR IN**
11 **ANY FASHION THEY WISH**

12 King County also asserts that not only is the railroad easement currently burdening the
13 land, but that it is not limited to the construction and operation of a railroad, but rather, the
14 easement also includes “incidental activities.” As noted in King County’s motion for summary
15 judgment, incidental uses are not just those activities that are “not inconsistent and do not
16 interfere with the operation of the railroad,” but also must “further the railroad’s business as a
17 transportation company.” *See Neitzel v. Spokand Int’l Ry Co.*, 141 P.186, 188 (Wa. 1914).
18 Even if the railroad purposes easement were to currently exist, the incidental use doctrine does
19 not apply to King County because King County is not a railroad and any other potential uses
20 besides recreational trail use are not incidental to a railroad purpose and do not further the
21 railroad’s business. As a result, King County has no right to use the former railroad corridor
22 for any use other than a recreational trail.

23
24 King County cites to *Neitzel* and *Kershaw* to support its allegation of incidental uses.
25 King County cites to *Neitzel* as support for its apparent lack of abandonment argument to assert

1 the current existence of the current railroad purposes easement argument. However, *Neitzel*
2 provides no support whatsoever for the Defendant's conclusion. *Neitzel* involved a case where
3 the railroad was still operating and leased lots in exchange for the lessee company's agreement
4 to construct a two-story building and route all its business over the railway company's road
5 (obviously benefiting the railroad)—and the railroad company anticipated that it would in the
6 "near future" need and expect to devote the grounds for terminal use and use the new buildings
7 as more superior freight houses. Not only was the railroad still active and running trains over
8 the land next to the lots, the court held that the use was concurrent with and did not exclude
9 the railroad's occupation, and was consistent with railroad purposes **and furthered the**
10 **railroad's business**. *Neitzel*, 141 P. 186. In order to be a valid incidental use, such use must
11 also benefit the railroad and further the railroad's business as was held in *Neitzel*.
12

13 King County also cites to an appellate ruling in *Kershaw Sunnyside Ranches Inc. v.*
14 *Yakima Interurban Lines Ass'n*, 91 P.3d 104.116 (Wash. 2004) as support for their assertion
15 that the incidental use doctrine applies to railroad rights-of-way, just as it does to public
16 highways. The *Kershaw* appellate opinion was overturned by the Washington Supreme
17 Court—a fact that the Defendants continue to ignore or try to work around. King County cites
18 to the *Kershaw* appellate opinion to state that a railroad easement allows incidental uses. The
19 *Kershaw* cases involve the laying of fiber optic cables and the Kershaws sued the
20 communication company for trespass. The communications company argued that no trespass
21 occurred because the railroad had authorization to allow fiber optic cable in the subsurface of
22
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25

1 Kershaw's land under the incidental use doctrine. The **trial court** rejected the communication
2 companies' argument. *Kershaw*, 2003 WL 25275291.⁵ The trial court correctly held that:

3 incidental uses **are measured** by what is **reasonably necessary** for the
4 **building, operation and maintenance of the railroad** and where the fiber
5 optic cable will be used substantially to service other members of the public and
6 **where the railroad is not significantly dependent on the fiber optic cable**
7 **for its primary means of communication, the cable is not an "incidental**
8 **use" of the railroad.**

9 *Id.*

10 The Washington Supreme Court case of *Kershaw* addressed both the trial court
11 decision and the appellate court's decision on incidental uses:

12 The trial court rejected Level 3's contention that the **fiber optic lines were an**
13 **incidental use. Centering its analysis on whether the "incidental use" is**
14 **reasonably necessary to the operation of the railroad, and finding that**
15 **"[i]ncidental rights should be limited to facilitating construction,**
16 **maintenance and operation of the railroad,"** the trial court determined that
17 the buried fiber optic line here is not an incidental use. *Id.* at 974. It thus
18 concluded that Level 3's line constituted a trespass. *Id.* at 19, 974. The Court
19 of Appeals found no trespass and rejected the trial court's strict reliance on the
20 relationship between the alleged incidental use and railroad operations. Rather,
21 it held that the incidental use doctrine applies so long as "the use is 'not...
22 inconsistent with the public use to which the highways are dedicated,'"

23 *Kershaw*, 126 P.3d at 27-29 (various citations omitted) (emphasis added).

24 Thus, even though the trial court concluded that incidental uses had to be related to the
25 railroad's business and the appellate court merely said incidental uses were proper if they did
not interfere with the operation of the railroad, the Supreme Court of Washington basically
ducked the issue. Plaintiffs do not have any dispute with the concept of incidental uses if the

⁵ Counsel for Plaintiffs in this case also represented Robert Kershaw in a Trails Act takings case and have personal knowledge of Mr. Kershaw and the Kershaw properties and lawsuits. *See Blair v. United States*, Case no. 09-528 (Fed. Cl. 2014).

1 railroad purposes easement currently exists, but do dispute the scope of what incidental uses
2 are appropriate. As this Court pointed out, citing *Neitzel*, “the Washington Supreme Court
3 already implicitly approved the incidental use doctrine, holding that a railroad easement will
4 not be abandoned ‘so long as the use to which the property is put, although a private use, is
5 incidental to the company’s business as a transportation company.’”⁶ Any purported incidental
6 uses by King County are not incidental to the railroad purposes easement, even if it exists,
7 because they do not support the railroad’s business in any fashion.
8

9 **IV. THE RULING IN *KASEBURG* WAS WRONGLY DECIDED**

10 Although Plaintiffs acknowledge that Judge Coughenour ruled that the railroad purposes
11 easement currently exists in *Kaseburg*, Judge Coughenour’s opinion is incorrect for several
12 significant reasons:

- 13 • ***Kaseburg* was wrongly decided because it ignores the plain language of the**
14 **Trails Act**

15 As noted in Section II *supra*, the Trails Act only authorizes interim use of abandoned
16 railroad corridors for recreational trail use. King County’s argument that there is nothing in
17 the Trails Act that bars other uses is flawed because the Trails Act only authorizes trail use and
18 that excludes other uses by definition. Further, the Trails Act and case law interpreting it,
19 expressly state that the railroad corridor is preserved for FUTURE use, not current use as a
20 railroad corridor.
21

- 22 • ***Kaseburg* was wrongly decided because it ignores the fact that railbanking**
23 **is not a railroad purpose and no Trails Act taking could occur if Judge**
24 **Coughenour is right**

25

⁶ Court Order, D.E. 138, at p. 15.

1 Railbanking is NOT a railroad purpose. If railbanking was a railroad purpose, there
2 would never be a Trails Act taking because if the railroad purposes easement exists before and
3 after the NITU, then no reversionary interest was blocked and there is no taking.

- 4 • ***Kaseburg* was wrongly decided because, under Washington law, a change**
5 **in use under state law extinguishes the RR purposes easement**

6 *See Lawson; Preseault II.*

- 7 • ***Kaseburg* was wrongly decided and is directly contrary to every decision**
8 **from every judge of the CFC and every case before the Federal Circuit,**
9 **who deal with the Trails Act routinely**

10 *See Sections II and III supra.*

11 **V. CONCLUSION**

12 King County's purported claim to be able to use the railroad corridor in any fashion
13 they wish should be rejected. King County did not acquire any valid rights in the corridor
14 other than for interim use as a recreational trail because that is all that is acquired under the
15 Trails Act while the corridor is railbanked for FUTURE use. Further, even if the railroad
16 purposes easement currently exists, which it does not, any use other than a recreational trail, is
17 not authorized, King County is not a railroad, cannot authorize incidental uses, any other use
18 beyond a recreational trail is a violation of Plaintiffs' property rights.

19
20 As a result, Plaintiffs' cross-motion for summary judgment should be granted.

21 Date: March 11, 2016.

22 **STEWART, WALD & MCCULLEY, LLC**

23 By /s/ Thomas S. Stewart

24 Thomas S. Stewart

Elizabeth Gepford McCulley

25 Michael J. Smith

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**PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION
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17 **CERTIFICATE OF SERVICE**

18 I hereby certify that on the 11th day of March, 2016, the foregoing was filed
19 electronically with the Clerk of the Court to be served by the operation of the Court's electronic
20 filing system upon all parties of record.

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